INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

The Complaint 4

The Proceedings Below 4

The Agreements Approved by the Civil Aeronautics Board Between 1947 and 1962 6

The Exemption Granted by the Civil Aeronautics Board in 1962 8

The 1970 Ryd-Air Agreements 8

Reasons for Granting the Writ 9

ARGUMENT

A. The Conflict with *Carnation Co.* v. *Pacific Westbound Conference* and *Ricci* v. *Chicago Merchantile Exchange* 11

B. The Conflict with *Pan American World Airways, Inc.* v. *United States* and *Hughes Tool Company* v. *Trans World Airlines, Inc.* 14

C. The Pre-emption of the Antitrust Field Under Sections 408 and 412 of the Act 16

D. The Denial of Due Process 18

CONCLUSION 21

PAGE

APPENDIX A

Opinion of Circuit Court of Appeals for Second Circuit 1a

Order Denying Petition for Rehearing 14a

Order Denying Petition for Rehearing in Banc.. 15a

Opinion of Irving Ben Cooper, *D. J.* 16a

Memorandum by Cooper, *D. J.* on Reargument 20a

Order on Reargument and Granting Certification of an Interlocutory Appeal 22a

APPENDIX B

Constitutional Provisions, Statutes and Regulations Involved 24a

APPENDIX C

Agreement 30a

Order Approving Agreement 34a

TABLE OF AUTHORITIES

Cases:

Armstrong v. *Manzo*, 380 U.S. 545 (1965) 20

Brinkerhoff-Faris Co. v. *Hill*, 281 U.S. 673 (1930) 20

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 9, 11, 12, 13

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 20

Hughes Tool Company v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131 (U.S. Jan. 10, 1973) 6, 10, 13, 14, 15, 16, 17

PAGE

Laveson v. *Trans World Airlines, Inc.*, —— F.2d —— (3d Cir., No. 71-2156, December 26, 1972, 12 CCH Av. Cas. 17,684) 13

Morgan v. *United States*, 304 U.S. 1 (1938) 20

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 10, 16, 17

Ricci v. *Chicago Mercantile Exchange*, 41 U.S.L.W. 4097 (U.S. Jan. 9, 1973) 10, 11, 13

Trans World Airlines, Inc. v. *Hughes*, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 390 U.S. 248 (1965) 6, 14, 15

Statutes:

Federal Aviation Act of 1958:
§408(a), 72 Stat. 767, 49 U.S.C. §1378(a) 3
§412, 72 Stat. 770, 49 U.S.C. §1382 ..... 3, 8, 9, 10, 15, 16
§414, 72 Stat. 770, 49 U.S.C. §1384 ..... 3, 7, 8

28 U.S.C. §1254(1) 2
28 U.S.C. §1292(b) 5

Regulations:

Civil Aeronautics Board:
§289.3, 14 C.F.R., Part 289 ..... 3, 8, 9, 17

Other Authorities:

United States Constitution:
Amendment V 3

Restatement of Agency 2d ¶144 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

AIR CARGO, INC., et al.,

Petitioners,

—against—

BREEN AIR FREIGHT, LTD., and
MERCURY AIR FREIGHT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Air Cargo, Inc., Ryder System, Inc., Ryd-Air, Inc., Air Canada, Airlift International, Inc., Allegheny Airlines, Inc., American Airlines, Incorporated, British Overseas Airways Corp., Braniff Airways Incorporated, Delta Air Lines, Inc., Eastern Air Lines, Incorporated, Mohawk Airlines, Inc., National Airlines, Inc., Northwest Airlines, Incorporated, Northeast Airlines, Incorporated, New York Airways, Inc., Flying Tiger Lines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Southern Airways, Inc., Seaboard World Airlines, Inc., Trans World Airlines, Inc. and United Air Lines, Inc., pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit entered on November 10, 1972, which affirmed two orders of Judge Irving

Ben Cooper of the United States District Court for the Southern District of New York denying petitioners' motion to stay this antitrust action on the ground that primary jurisdiction over the subject matter resided in the Civil Aeronautics Board.

Opinions Below

The opinion of the Court of Appeals, review of which is sought, is not officially reported. A copy of this opinion and of the two opinions of the District Court are set forth in Appendix A hereto, *infra*, pp. 1a-23a.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was entered on November 10, 1972. A timely petition for rehearing and suggestion for rehearing en banc was filed on November 22, 1972 and denied on November 29, and December 7, 1972, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Civil Aeronautics Board has primary jurisdiction when an antitrust complaint challenges the conduct of a wholly-owned subsidiary of the airlines in entering into agreements covering the pick-up and delivery of air freight, when such conduct is at least arguably lawful under the Federal Aviation Act as constituting the implementation of an agreement among air carriers previously approved by the Civil Aeronautics Board?

2. When the Civil Aeronautics Board has approved an agreement among air carriers to employ their wholly-

owned subsidiary to act as their agent in providing "directly or by contract" the pick-up and delivery of air freight at all points within the continental United States served by the air carriers, is the providing of such services "by contract" through a subsidiary of a motor carrier, in which subsidiary the air carriers owned a minority interest, immunized from the operations of the antitrust laws under Section 414 of the Federal Aviation Act?

3. Does Civil Aeronautics Board jurisdiction under Sections 408 and 412 of the Federal Aviation Act with respect to the relation of common carriers to air carriers and contracts between air carriers and other carriers, preempt the antitrust field?

4. Are defendants deprived of property without due process of law in violation of the Fifth Amendment when a court denies an evidentiary hearing necessary to determine the subject matter jurisdiction of the Civil Aeronautics Board and the consequent immunization of the defendants under the antitrust laws?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix B hereto, *infra*, pp. 24a-29a. They include the following:

1. United States Constitution, Amendment V.
2. United States Code, Title 49, Sections 1378(a), 1382 and 1384 (Federal Aviation Act §§ 408(a), 412, 414).
3. The Economic Regulations of the Civil Aeronautics Board, § 289.3 (14 C.F.R., Part 289).

Statement of the Case

The Complaint

On February 10, 1971 the plaintiffs Breen Air Freight, Ltd. ("Breen") and Mercury Air Freight, Inc. ("Mercury"), commenced this action against Air Cargo, Inc. ("ACI"), Ryder System, Inc. ("Ryder"), Ryd-Air, Inc. ("Ryd-Air") and the defendant air carriers seeking unspecified treble damages for alleged violation of the antitrust laws and claiming damages for breach of contract in the amount of $1,000,000 plus attorney's fees and costs.

The complaint (5a-21a)* alleges that the petitioners have combined and conspired and have engaged in unfair business practices designed to eliminate competition and restrain trade among carriers engaged in the pick-up and delivery of domestic air freight in commerce in the Metropolitan area of the City of New York by removing plaintiffs, among others, from the relevant market involved.

The Proceedings Below

On April 23, 1971 petitioners moved to stay the action on the ground that primary jurisdiction is vested in the Civil Aeronautics Board under the Federal Aviation Act of 1958 (22a-23a).

In an order and opinion dated December 6, 1971 the District Court denied petitioners' motion for a stay, stating:

> "The activities at issue are not 'arguably lawful' under the Federal Aviation Act. No party to the Ryd-Air agreement is an 'air carrier' under Section 412 (a)

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* References are to the Joint Appendix on appeal to the United States Court of Appeals for the Second Circuit. Unless otherwise indicated, emphasis is supplied.

of the Act, 49 U.S.C. §1382(a); the agreement has not been submitted to the C.A.B.; without C.A.B. approval actions pursuant to an agreement are not immune from the antitrust laws." (App. A, p. 19a).

On motion for reargument petitioners requested an evidentiary hearing to demonstrate that ACI acted as agent for the airlines in entering the agreement with Ryder System, Inc. of May 30, 1970 (101a-103a) so that "air carriers" were thus parties to such agreement, contrary to the conclusion of the District Court. In a memorandum opinion dated February 16, 1972 the District Court denied an evidentiary hearing and adhered to its original decision, stating:

> "The record does not contain factual allegations to support either the position that Air Cargo, Inc. acted as agent for the airlines in the ACI-Ryder agreement or to create the necessity of a hearing on this issue." (App. A, p. 20a).

Following certification of an interlocutory appeal pursuant to 28 U.S.C. §1292(b), the Court of Appeals on November 10, 1972 affirmed the orders of the District Court denying the motion for a stay, holding:

> "We rest on the ground that the [Ryd-Air] agreements, viewed as interdependent parts of a single inclusive plan, have not been executed by 'air carriers' and that consequently the Board lacks authority to immunize the contracting parties from liability for antitrust damages." (App. A, p. 6a).

Alternatively, the Court of Appeals held:

> "Even if we were to find that the Board could immunize the agreements under its Section 412 authority,

we would still conclude, on the basis of *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2 Cir. 1968), *cert. denied*, 393 U.S. 846 (1968), that the doctrine of primary jurisdiction is inapplicable." (App. A, p. 10a).

The Court explained this conclusion saying:

"The Board's 1947 approval of ACI merely authorizes its establishment and approves its then-contemplated activities which flow therefrom. *Trans World Airlines, Inc.* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964)." (App. A, pp. 12a-13a).

The decision upon which the Court of Appeals thus rested, *Trans World Airlines, Inc.* v. *Hughes*, has since been reversed by the decision of this Court in *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131 (U.S. Jan. 10, 1973).

The Agreements Approved by the Civil Aeronautics Board Between 1947 and 1962

On December 31, 1947 the Civil Aeronautics Board ("CAB") approved an agreement under which the U.S. scheduled airlines employed their wholly owned subsidiary, ACI, to act as their agent in providing cartage services for the ground transportation of air freight at each airport served in the continental United States (43a-46a).* The agreement contemplated that ACI would provide such services "directly or by contract" (40a).

In 1948 the CAB reaffirmed its approval of this agreement saying:

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* Pertinent provisions of this agreement and of CAB Order Serial No. E-1086 are set forth in Appendix C, *infra*, pp. 30a-37a.

"We are fully in sympathy with all efforts of air carriers to reduce costs by consolidation of individual duplicating ground and terminal facilities. These efforts are clearly within the scope of the policy of Section 2 of the Civil Aeronautics Act and thus in the public interest. . . . Cooperative efforts of air carriers to accomplish these results through agreements such as that establishing Air Cargo receive, and will continue to receive, our support and encouragement" 9 C.A.B. 468, 469 (1948).

By reason of such approval ACI and the defendant air carriers were relieved from the operations of the antitrust laws under Section 414 of the Civil Aeronautics Act of 1938, 52 Stat. 1004, which provided:

"Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." *

Under the 1947 agreement ACI could have provided such cartage service "directly," i.e., by employing its own drivers and trucks. Initially, however, it was not deemed feasible for ACI to provide such services "directly." Instead ACI provided the service "by contract" (27a).

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* Section 414 of the Civil Aeronautics Act of 1938 is continued in effect under Section 414 of the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. §1384.

Save at a few of the larger airports, where it was necessary to contract with more than one trucker, ACI contracted with a single motor carrier in each area to provide the pick-up and delivery service. The CAB in 1952 described such carriers as "the recognized 'airline cartage agent' for the area, a single trucking concern with which Air Cargo has contracted for pickups and deliveries serving all the certificated airlines in the area" 15 C.A.B. 850, 851 (1952).

Between 1948 and 1962 each of the contracts between ACI and the local motor carriers was filed with and approved by the CAB pursuant to Sections 412 and 414 of the Federal Aviation Act (49 U.S.C. §§1382 and 1384)* (27a).

The Exemption Granted by the Civil Aeronautics Board in 1962

Because the ACI cartage contracts were substantially identical in form, and because the airline tariffs filed with the CAB described the services provided and the rates charged (28a), the CAB, effective March 8, 1962, dispensed with the requirement that the ACI cartage agreements be filed under Section 412 of the Act.**

The 1970 Ryd-Air Agreements

For a number of years prior to 1970 ACI had contracted with the plaintiffs, Breen and Mercury, to provide cartage services for the defendant airlines in the New York Metropolitan area (16a, 18a). By 1970 the services of

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* Prior to 1958 such filing and approval was effected under Sections 412 and 414 of the Civil Aeronautics Act of 1938, 52 Stat. 1004.

** Economic Regulations, Civil Aeronautics Board §289.3 (App. B, pp. 27a-28a).

Breen and Mercury had deteriorated to such an extent that replacement of these carriers became necessary (33a).

The airlines requested ACI to consider providing cartage service directly, but once again direct service was found to be impracticable (33a).

As an alternative to direct service, ACI on May 30, 1970 contracted with the defendant Ryder. Ryder agreed to form a subsidiary to be known as Ryd-Air, Inc. in which ACI, as agent for the air carriers, would own a 20% minority interest (101a). The sole purpose of incorporating Ryd-Air was to permit it to "perform air freight pick-up and delivery service in New York City Area A" (101a).

Following the formation of Ryd-Air, ACI on June 30, 1970 entered into its standard form of pick-up and delivery service contract with Ryd-Air under which Ryd-Air agreed to perform cartage services for the air carriers in New York City (149a-187a). This cartage agreement, which is continuing in effect, is substantially identical with all other cartage agreements between ACI and local motor carriers throughout the United States, except that Ryd-Air is guaranteed its operating costs plus a 5% profit (34a; 153a).

Because of the exemption provided by Section 289.3 of the CAB's Economic Regulations, the 1970 Ryd-Air agreements were not filed with the CAB under Section 412 of the Act (28a).

Reasons for Granting the Writ

The decision of the Court of Appeals is in direct conflict with the holding of this Court in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 220 (1966), that courts must refrain from imposing antitrust sanctions for activities of "debatable legality" under administrative agency

jurisdiction. Contrary to this Court's ruling in *Carnation*, the Court of Appeals here would defer to the administrative agency only when the activities involved had been "explicitly" approved by the administrative agency.

The decision of the Court of Appeals is also in conflict with the decision of this Court in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), and the very recent decision of this Court in *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131 (U.S. Jan. 10, 1973), decided subsequent to the decision of the Court of Appeals, that transactions under the control and surveillance of the Civil Aeronautics Board by virtue of the Federal Aviation Act are not subject to the antitrust laws.

The decision of the Court of Appeals is likewise in conflict with the decision of this Court in *Ricci* v. *Chicago Mercantile Exchange*, 41 U.S.L.W. 4097 (U.S. Jan. 9, 1973), also decided after the decision below, that judicial proceedings should be stayed to afford opportunity for administrative consideration "when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress" 41 U.S.L.W. at 4100-01.

The decision of the Court of Appeals entirely ignores the considerations which led the CAB in 1962 to exempt the airlines from the requirement that cartage agreements, such as the one here challenged, be filed with the CAB under Section 412 of the Act. As a result, the validity of over 400 such cartage agreements throughout the United States may be subject to challenge.

The decision of the Court of Appeals that the CAB has no jurisdiction in this case ignores a quarter of a century's surveillance by the CAB of the activities of ACI in providing cartage services for its air carrier members.

In reaching this decision the Court of Appeals and the District Court have denied the air carrier defendants an evidentiary hearing which would have demonstrated conclusively that the CAB had and has jurisdiction in this matter.

The decision thus violates due process of law, emasculates an important section of the Federal Aviation Act and invites collision between the CAB and the courts.

As in *Ricci* v. *Chicago Mercantile Exchange, supra* at 4100, the problem to which the Court of Appeals addressed itself in this case "is recurring," and is of importance in the administration of the antitrust laws and the Federal Aviation Act.

ARGUMENT

A. The Conflict with *Carnation Co.* v. *Pacific Westbound Conference* and *Ricci* v. *Chicago Mercantile Exchange.*

There is a direct conflict between the holding of the Court of Appeals in this case and the holding of this Court in *Carnation Co.* v. *Pacific Westbound Conference, supra.* The holding of this Court in *Carnation Co.* was specific:

> ". . . courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission" 383 U.S. at 220.

Here the CAB in 1947 had approved an agreement among the airlines to employ ACI, as their agent, to provide cartage service for the pickup and delivery of air freight at every airport in the United States. This agreement expressly provided that ACI was to provide such cartage service for the airlines "directly or by contract" (40a).

In implementation of that agreement, ACI, as the agent of the airlines, entered into an agreement with Ryder to form Ryd-Air and a cartage agreement with Ryd-Air for the pickup and delivery of air freight in the New York area.*

How then may the airlines' 1970 conduct be challenged as a violation of the antitrust laws? Certainly it would appear that ACI, acting as agent for the airlines, was acting precisely as the CAB contemplated ACI would act under the 1947 agreement. ACI was merely providing cartage services for the airlines in the New York area "by contract" with Ryd-Air. At the very least, the conduct of ACI and the defendant air carriers was thus "arguably lawful" and the Court of Appeals should have stayed this action in the light of this Court's decision in *Carnation Co., supra.*

In order to reach its contrary decision in this case, the Court of Appeals made a finding that the CAB in 1947 clearly intended "that the future activities of ACI were to be limited under the Order** to those *explicitly* set out in the 1947 agreement" and that these activities did not contemplate an agreement with a cartage agent in which the airlines owned a minority interest, or the formation of such a company (App. A, p. 12a).

The Court of Appeals would thus emasculate the holding of this Court in *Carnation Co.* that the courts must not impose antitrust sanctions for activities of "debatable legality". If there is "explicit approval", legality is not "debatable" and there is no need for the application of

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* The cartage agreement with Ryd-Air recites that ACI was *"acting as agent for and on behalf of Air Carriers, who are stockholders or associate participants in the Company [ACI]"* (149a).

** CAB Order Serial No. E-1086, December 31, 1947, App. C, pp. 34a-37a.

primary jurisdiction; such a case, in view of the provisions of Section 414 of the Act, should be dismissed,* not merely stayed and referred back to the Board.

Even where the administrative agency regime is not pervasive, as here, this Court has stayed judicial proceedings to provide to the antitrust court the help of a prior determination by the regulatory agency in arriving "at the essential accommodation between the antitrust and the regulatory regime." *Ricci* v. *Chicago Mercantile Exchange, supra,* 41 U.S.L.W. at 4103. *A fortiori* the Court of Appeals here should have stayed this action pending reference to the CAB.**

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* *Hughes Tool Company* v. *Trans World Airlines, Inc., supra,* 41 U.S.L.W. 4131.

** The decision of the Court of Appeals here is also in direct conflict with the subsequent decision of the United States Court of Appeals for the Third Circuit in *Laveson* v. *Trans World Airlines, Inc.,* —— F.2d —— (No. 71-2156, December 26, 1972, 12 CCH Av. Cas. 17,684), where the Court stayed an antitrust action charging the defendant airlines with conspiring to fix the price for the rental of headsets used with inflight motion pictures on the ground that the CAB had primary jurisdiction. In 1967, 12 domestic air carriers, including defendants, had filed with the CAB for approval under Section 412 of the Act an agreement providing for a "$2 charge for visual inflight entertainment on domestic flights." The CAB subsequently deferred definitive action on the filed agreement and stayed effectiveness of an amendment to its Economic Regulations so as to require the carriers offering visual inflight entertainment to provide a charge therefor in their tariffs. Rejecting an argument that courts may not properly defer to agency jurisdiction when the CAB has not yet expressly approved the alleged illegal agreement, and expressly following this Court's holding in *Carnation Co., supra,* the Court stated " . . . regardless of the particular remedy sought, the subject matter of this action falls within the regulatory jurisdiction of the CAB" 12 CCH Av. Cas. at 17,689.

B. The Conflict with *Pan American World Airways, Inc.* v. *United States* and *Hughes Tool Company* v. *Trans World Airlines, Inc.*

When the defendants in this case moved to stay the present action and, indeed, when the Court of Appeals handed down its decision on November 10, 1972, this Court had not yet rendered its decision in *Hughes Tool Company* v. *Trans World Airlines, Inc., supra.*

In the light of this Court's holding in *Hughes,* the complaint herein should be dismissed, not merely stayed.

In concluding that the CAB's 1947 approval empowering ACI to provide cartage services for the defendant airlines "directly or by contract", did not authorize ACI to contract for such cartage services with Ryd-Air, the Court of Appeals relied on its 1964 holding in *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602, *cert. dismissed,* 390 U.S. 248 (1965).*

The 1964 decision of the Court of Appeals has now been reversed by this Court in *Hughes Tool Company* v. *Trans World Airlines, Inc., supra.*

Here, as in *Hughes,* the CAB had retained jurisdiction and exercised surveillance over the activities of ACI for over a quarter of a century. When it reaffirmed its 1947 order on September 2, 1948 the CAB stated:

> "Cooperative efforts of air carriers to accomplish these results [the consolidation of individual duplicating ground and terminal facilities] through agreements

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* The Court of Appeals stated (App. A, pp. 12a-13a):

> "The Board's 1947 approval of ACI merely authorizes its establishment and approves its then-contemplated activities which flow therefrom. *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602 (2 Cir. 1964); see Federal Aviation Act 414, 49 U.S.C. § 1384."

such as that establishing Air Cargo receive, and will continue to receive, our support and encouragement" 9 C.A.B. 468, 469 (1948).

In succeeding years the CAB specifically approved hundreds of ACI cartage agreements filed with it pursuant to Section 412 of the Act (27a). All of these agreements granted the local trucker so employed the exclusive right to serve the airlines. The CAB expressly noted this practice with approval in 1952, describing such truckers "as the recognized 'airline cartage agent' for the area" 15 C.A.B. 850, 851 (1952).

As above noted,* the ACI cartage agreements were identical in form and the anticompetitive considerations the same. Accordingly, after specifically approving hundreds of ACI cartage agreements, the CAB in 1962 dispensed with the requirement that such agreements be filed under § 412 of the Act. For that reason the 1970 ACI cartage agreement with Ryd-Air was not filed with the CAB (28a). Notwithstanding the absence of filing and specific approval in 1970, the action of ACI in arranging to have Ryd-Air provide cartage service for the airlines "by contract" was clearly authorized by the 1947 approval of the CAB. Thus, as in *Hughes,* the Court of Appeals here erred "in construing and applying § 414, which immunizes from antitrust liability any conduct approved, authorized or required by any Board ordrer issued under" § 412.**

Furthermore, the Court of Appeals misapprehended the significance of the CAB's surveillance over ACI. Instead, it followed the approach taken in its 1964 decision in *Trans World Airlines, Inc.* v. *Hughes, supra,* 332 F.2d 602, by ascribing an extremely limited area of jurisdic-

* *Supra,* p. 8.

** 41 U.S.L.W. at 4138.

tion for the CAB. Thus, as this Court noted in 1973, the Court of Appeals had held that "TWA's complaint against Toolco was 'unrelated to any specific function of the CAB' and hence was not within the exclusive competence of that body" 41 U.S.L.W. at 4137. Here the Court of Appeals took an equally narrow view of the jurisdiction of the CAB by declaring that "[a]s we interpret the CAB order, it cannot possibly have comprehended the formation of Ryd-Air or approved its creation years after the issuance of the order." (App. A, p. 11a). It was precisely this overly restrictive view of CAB jurisdiction that was subsequently rejected by this Court in *Hughes Tool Company* v. *Trans World Airlines, Inc.*

The complaint should be dismissed, not merely stayed.

C. The Pre-emption of the Antitrust Field Under Sections 408 and 412 of the Act.

In *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), this Court held that the jurisdiction of the CAB under §408 of the Act pre-empted the antitrust field "even though the CAB had taken no action to investigate . . . the alleged misfeasance. . . ." *Hughes Tool Company* v. *Trans World Airlines, Inc., supra* at 4138. In reaching this conclusion as to the scope of the CAB jurisdiction this Court emphasized, 371 U.S. at 305, that "the relation of common carriers to air carriers" is "basic in this regulatory scheme" and that "the acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority . . . in allowing or disallowing affiliations between common carriers and air carriers."

Here, as in *Pan American,* there is present an affiliation between a common carrier, Ryd-Air, and air carriers acting through their agent, ACI.

Here, as in *Hughes,* there was CAB control and surveillance over the activities of ACI for 25 years.

The CAB, in its Order* approving the employment of ACI by the air carriers to provide "directly or by contract, pick-up and delivery services at all points within the continental United States" served by the air carriers (App. C, p. 32a), made clear its intention to exercise control and surveillance over the activities of ACI, stating:

> ". . . the future development of Air Cargo, Inc. is uncertain and . . . its activities may require future reconsideration of the approval granted herein;" (App. C, p. 36a).

Accordingly, the CAB conditioned its approval of the employment of ACI by requiring:

> "(1) That Air Cargo, Inc. and its member air carriers supply to the Board copies of such agreements and documents and submit such information in relation to the activities of Air Cargo, Inc. as may be prescribed or requested by the Economic Bureau of the Board." (App. C, p. 35a).

The air carriers and ACI have fully complied with all requirements prescribed or requested by the CAB's Economic Bureau and the CAB has continued to exercise control and surveillance over the activities of ACI.**

Accordingly, pursuant to the decisions of this Court in *Pan American World Airways, Inc.* v. *United States* and *Hughes Tool Company* v. *Trans World Airlines, Inc., supra,* the complaint herein should be dismissed on the ground

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* CAB Order Serial No. E-1086, December 31, 1947, App. C, pp. 34a-37a.

** See, e.g., 9 C.A.B. 468 (1948); 15 C.A.B. 850 (1952); Order No. E-14601 (1959); Order 68-7-40 (1968). Hundreds of ACI's cartage agreements were approved by the CAB between 1947 and 1962 when the CAB dispensed with the requirement that such agreements be filed under Section 412 of the Act (Economic Regulations §289.3, App. B, pp. 27a-28a).

that CAB jurisdiction under Sections 408 and 412 of the Act pre-empts the antitrust field.

D. The Denial of Due Process.

The Court of Appeals held that ACI is not an "air carrier" and hence the CAB would have jurisdiction only when ACI contracts as agent for the airlines, who would then become parties to the contract as disclosed principals of their agent, ACI. *Restatement of Agency 2d* ¶144.

The Court of Appeals admits that the cartage agreement between ACI and Ryd-Air of June 30, 1970 (149a-187a) would clearly fall within the CAB's jurisdiction, since that agreement expressly recited that ACI was "acting as agent for and on behalf of the Air Carriers" (149a).

That admission would seem to dispose of any contention that the CAB does not have jurisdiction in this case. The only important agreement here is the agreement to employ Ryd-Air to perform cartage services for the airlines in the New York area, thus ousting plaintiffs from performing such services.

Nonetheless, the Court of Appeals held that the CAB in this case "lacks authority to immunize the contracting parties from liability for antitrust damages." (App. A, p. 6a).

In order to reach this conclusion the Court of Appeals ignored the ACI-Ryd-Air cartage agreement of June 30, 1970. Instead it focused solely on "the first of the two agreements, the one by which ACI agreed to participate in the creation of Ryd-Air." (App. A, p. 7a).

The Court of Appeals then found that ACI was not acting as agent for the airlines in signing this agreement with Ryder System, Inc. of May 30, 1970. This finding rested on a negative inference, i.e., "there is no indication on the

face of the Ryd-Air agreement that ACI signed it as an agent of the airlines." (App. A, p. 8a).

Such a finding ignores the fact that ACI is a wholly owned subsidiary of the airlines. Furthermore, it ignores the affirmative evidence on the face of this agreement that ACI was acting as agent for the airlines. The agreement expressly recited that:

> "... the parties have agreed that a subsidiary of Ryder shall perform air freight pick-up and delivery service in New York City Area A pursuant to a Pick-up and Delivery Service contract between Air Cargo and such subsidiary, ..." (101a).

As the Court of Appeals stated, the two agreements were "interdependent" and "inseparable" (App. A, pp. 6a-7a). Both agreements were "a single inclusive plan" for pick-up and delivery service in the New York area. Since ACI was admittedly acting as agent of the airlines in one of the "inseparable" agreements, it clearly was acting as such agent in the other.

The Court of Appeals then rejected the airlines' contention that they had ratified ACI's actions by their subsequent dealings with Ryd-Air under the cartage agreement of June 30, 1970. In rejecting this contention, the Court of Appeals said:

> "Here there is no evidence in the record that the airlines knew the material facts involved in the formation of Ryd-Air or that they communicated a desire to ratify its formation." * (App. A, p. 10a).

In the District Court the airlines had requested an evidentiary hearing to demonstrate in fact that ACI was act-

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* As the plaintiffs are fully aware, this finding is *contrary to fact*. The April 28, 1970 minutes of the meeting of ACI's directors, produced on discovery to plaintiffs, show that (1) vice presidents of seven airlines attended this meeting as ACI directors.

ing as their agent in both Ryd-Air agreements and that they did know "the material facts involved in the formation of Ryd-Air."

The District Court denied this request for an evidentiary hearing, saying:

> "The record does not contain factual allegations to support either the position that Air Cargo, Inc. acted as agent for the airlines in the ACI-Ryder agreement or to create the necessity of a hearing on this issue." (App. A, p. 20a).

Solely because an evidentiary hearing was denied, the Court of Appeals has determined—contrary to fact—that ACI was not acting as agent for the airlines when it negotiated and signed "the first of the two agreements, the one by which ACI agreed to participate in the creation of Ryd-Air." (App. A, p. 7a).

Manifestly the refusal to grant a hearing on this all-important evidentiary fact denied defendants due process of law—"using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 678 (1930). "The right to a hearing embraces . . . the right to present evidence," *Morgan* v. *United States,* 304 U.S. 1, 18 (1938). "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U.S. 385, 394." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). The defendants here have been denied "an effective opportunity to defend . . . by presenting . . . [their] own arguments and evidence orally." *Goldberg* v. *Kelly,* 397 U.S. 254, 268 (1970).

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and (2) the meeting approved the negotiation of the *two* Ryd-Air agreements following a request by ACI's president that there be a policy determination of this matter at the airlines' corporate general office level.

CONCLUSION

For the reasons stated, this writ should be granted and the order of the Court of Appeals for the Second Circuit reversed.

Respectfully submitted,

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February 22, 1973

APPENDIX

APPENDIX A

Opinion of Circuit Court of Appeals for Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 91—September Term, 1972.

(Argued October 19, 1972 Decided November 10, 1972.)

Docket No. 72-1500

BREEN AIR FREIGHT, LTD., and
MERCURY AIR FREIGHT, INC.,

Plaintiffs-Appellees,

—v—

AIR CARGO, INC., RYDER SYSTEM, INC., RYD-AIR, INC., AIR CANADA, AIRLIFT INTERNATIONAL, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INCORPORATED, BRITISH OVERSEAS AIRWAYS CORP., BRANIFF AIRWAYS INCORPORATED, DELTA AIR LINES, INC., EASTERN AIR LINES, INCORPORATED, MOHAWK AIRLINES, INC., NATIONAL AIRLINES, INC., NORTHWEST AIRLINES, INCORPORATED, NORTHEAST AIRLINES, INCORPORATED, NEW YORK AIRWAYS, INC., FLYING TIGER LINES, INC., OZARK AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., SOUTHERN AIRWAYS, INC., SEABOARD WORLD AIRLINES, INC., TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC.,

Defendants-Appellants.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appendix A

Plaintiffs-appellees brought their action in the United States District Court for the Southern District of New York seeking treble damages from defendants-appellants as violators of the antitrust laws. Defendants' motion for a stay on the ground that the Civil Aeronautics Board had primary jurisdiction over the subject-matter of the complaint was denied, Cooper, *J.*, and defendants appealed. Order affirmed.

EDWARD BRODSKY, ROBERT E. STAFFORD, Goldstein, Shames & Hyde, New York City, *for Plaintiffs-Appellees.*

HAROLD L. WARNER, ZACHARY SHIMER, Chadbourne, Parke, Whiteside & Wolff, New York City, *for Defendants-Appellants other than Ryder System, Inc. and Ryd-Air, Inc.*

GEORGE D. REYCRAFT, P. JAY FLOCKEN, Cadwalader, Wickersham & Taft, New York City, *for Defendants-Appellants Ryder System, Inc. and Ryd-Air, Inc.*

WATERMAN, *Circuit Judge:*

This is an interlocutory appeal from two orders in which Judge Irving Ben Cooper of the Southern District of New York denied defendant-appellants' motion to stay this antitrust action. Defendants claimed that the facts plaintiffs allege show that primary jurisdiction over the subject matter resided in the Civil Aeronautics Board (CAB). Plaintiffs allege that defendants have committed violations of the antitrust law through their concerted refusal to deal with plaintiffs as airfreight cartage agents in metropolitan New York City. Defendants claim that plaintiffs'

action should be stayed until such time as the CAB has had an opportunity to conduct administrative proceedings on the complaint. After the motion for a stay was denied Judge Cooper certified an interlocutory appeal on the ground that an important controlling question of law was involved in the case and an immediate appeal from his ruling might materially advance the ultimate termination of the litigation. Appellants then moved in this court for leave to appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Fed. R. App. Pro., and we granted the motion. The sole issue before us is whether the doctrine of primary jurisdiction is operative under the circumstances here, so as initially to deprive the antitrust court of jurisdiction. For reasons which follow, we hold that the doctrine is not applicable here and we affirm the orders below denying the motion for a stay.

Under the Federal Aviation Act of 1958 (72 Stat. 731) the CAB is given broad authority to regulate certain aspects of the airline industry throughout the United States. See *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963). Pursuant to this authority the CAB is empowered to approve agreements among air carriers and air carriers and common carriers affecting air transportation. 49 U.S.C. § 1382. All agreements affecting air transportation must be filed prior to their implementation by the air carriers which are party to them, and, once approved by the CAB, these agreements are exempt from the operation of the antitrust laws, 49 U.S.C. § 1384, and the Board may also enjoin anticompetitive behavior among air carriers, 49 U.S.C. § 1381.

Plaintiffs Breen Air Freight, Ltd. and Mercury Air Freight, Inc. are corporations which formerly were engaged under contract with defendant Air Cargo, Inc.

(ACI) in the pickup and delivery of air freight in metropolitan New York City. Breen had been so engaged since 1967 and Mercury since 1948. In 1970 ACI refused to renew their contracts and, instead, signed a contract with defendant Ryd-Air, Inc., whereby Ryd-Air became exclusive cartage agent in New York City. Plaintiffs claim that this decision not to renew their contracts and the correlative agreement with Ryd-Air constitute a violation of the antitrust laws, and they seek treble damages.

With the approval of the CAB defendant ACI was first established in 1941 by seventeen certified air carriers as a joint research corporation. By 1944 its research had been completed and ACI became inactive. In 1947 ACI was reactivated by an agreement among the airlines to provide, directly or by contract, terminal and cartage services as agent of the air carriers. This agreement was filed with the Board and was approved by the Board by its Memorandum Order of December 31, 1947. The Board specified that it would require ACI to file such future ACI contracts and documents as its Economic Bureau should prescribe needed Board approval. Over 200 cartage contracts, such as those under which Breen and Mercury had been operating, were submitted and approved. As of March 8, 1962, however, the Economic Bureau exempted cartage contracts from the filing requirements and since that date ACI has not been required to file and has not filed with the Board its "pick-up and delivery contracts" with local agents.

In 1970 ACI executed two agreements with defendants Ryder System, Inc. and Ryd-Air. These agreements constitute the basis of the antitrust complaint. The first provided for the formation of Ryd-Air; it was to be a subsidiary of Ryder created for the purpose of providing

cartage services in metropolitan New York City. ACI took a 20% stock interest in Ryd-Air and two of five seats on the Board of Directors. Immediately thereafter Ryd-Air executed a second agreement, a cartage contract with ACI, by which it became the exclusive airfreight cartage agent in New York City. These agreements, although embodied in separate documents, were clearly part of a single inclusive plan wherein Ryd-Air would be formed, and, when formed, would then become the exclusive cartage agent in New York. Neither the Ryd-Air incorporation document nor the cartage contract was filed with or explicitly approved by the Board.

In opposition to plaintiffs' antitrust allegations defendants contend that even though these agreements have neither been filed nor approved by the CAB they have been immunized from the operation of the antitrust laws. As to the agreement creating Ryd-Air, they assert that this agreement is nothing more than an implementation of the air carriers agreement of 1947 which the Board had approved by its 1947 Order. As to the cartage contract, they assert that it was, and is, exempt from the filing requirement by the amended regulation of March 8, 1962 issued by the Economic Bureau. Alternatively, defendants urge that inasmuch as both agreements are at least "arguably lawful" (i.e., "arguably approved") the antitrust court must defer to the CAB under the authority of *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2 Cir. 1968), *cert. denied*, 393 U.S. 846 (1968).[1]

[1] *Carnation* was a private action for treble damages in which plaintiff alleged that a rate increase charged by defendant shipping corporations was a violation of the antitrust laws. Defendant Shipping Conference claimed they and their members were totally immune from the antitrust laws by virtue of the Shipping Act of

This court cannot agree that the agreements have been immunized, that they are "arguably lawful," or that the CAB has jurisdiction, primary or otherwise, to immunize them. We rest on the ground that the agreements, viewed as interdependent parts of a single inclusive plan, have not been executed by "air carriers" and that consequently the Board lacks authority to immunize the contracting parties from liability for antitrust damages.[3] Accordingly, nothing would be gained by sending the agreements back to the CAB for preliminary administrative agency action and we decline to do so. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341 at 357-358; *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7 Cir. 1970) *cert. denied*, 401 U.S. 994 (1971) (Chief Judge Swygert concurring at 277).

1916 which, they alleged, repealed all antitrust regulation of the rate-making activities of the shipping industry. They relied on the Court's prior decisions in *U.S. Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1931) and *Far East Conference* v. *U.S.*, 342 U.S. 570 (1951). However, the Supreme Court interpreted these decisions as permitting an antitrust suit for damages if the activities being attacked are not "arguably lawful" under the regulatory statute. Inasmuch as the activities were "arguably lawful" in *Carnation*, the Court determined that the judicial proceedings should be stayed, pending a determination by the Commission of the legality of the defendants' activities.

In *Allied* this court had before it a case "in all respects analogous to the *Carnation* case except that the alleged agreement concededly has not been passed upon by the CAB." 393 F.2d at 448. The district court had granted a stay, but our court reversed the district court, vacated the stay order, and instructed the district court to carry forward the proceedings on the antitrust claims.

[3] It is clear under Section 412 of the Act (49 U.S.C. §1382) that the Board can only approve and thereby immunize agreements to which "air carriers" are parties. Additionally, under Section 411 (49 U.S.C. §1381), the Board can issue cease and desist orders against air carriers, foreign air carriers, and ticket agents which are engaged in unfair methods of competition.

Also, inasmuch as the two agreements are inseparable, any authority the Board might have to immunize the parties from antitrust proceedings must be a broad enough authority to encompass the right to administrative control over the effectuation of both of them. Accordingly, we turn our attention to the first of the two agreements, the one by which ACI agreed to participate in the creation of Ryd-Air.

Although we find little assistance in the definitional section of the Federal Aviation Act of 1958 to help us define the phrase "air carrier" (49 U.S.C. § 1301(3) & (10)),[3] we think it clear from ACI's activities that ACI is not an "air carrier." ACI was formed as a subsidiary of the airlines for the limited purpose of acting solely as their agent in providing terminal and cartage services directly or by contract. From 1947 until the present ACI has functioned primarily as a contracting agent of the airlines; it cannot, and has not, engaged in the transportation of people or of cargo by air. Similarly, Ryder has never engaged in air transportation; its business is ground transportation. On the face of the Ryd-Air agreement it is obvious that neither of the signatories are "air carriers."

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[3] Subsections (3) and (10) of Section 101 of the Federal Aviation Act of 1958 (49 U.S.C. §1301) read as follows:

> (3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of the aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.
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> • • • •
>
> (10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

Defendants argue, however, that the airlines have become parties to the agreement arranging for the creation of Ryd-Air because ACI signed the document on behalf of the airlines as their agent, and thereby, in accord with well-understood principles of agency law, the airlines, as disclosed principals of their agent, became parties to the contract. Restatement of Agency 2d ¶ 144.

Although defendants urge this position in their briefs, we believe the facts demonstrate the opposite conclusion. Perhaps most importantly, there is no indication on the face of the Ryd-Air agreement that ACI signed it as an agent of the airlines. This is in contrast to the cartage contract, the second agreement involved here, in which, as well as in all prior cartage contracts, the language "as agent for and on behalf of the Air Carriers" appears on the face of the document. Furthermore, it seems obvious from the agreement of 1947 that ACI was given no authority to act on behalf of the airlines in a transaction such as the Ryd-Air agreement.[4] Indeed, the airlines primarily

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[4] Paragraph §7 of the Agreement defining the responsibilities of Air Cargo, Inc. reads as follows:

> 7. Each of the parties hereby confers upon Air Cargo, Inc. full power and authority, on its behalf, subject only to a limitation upon payment that may be due for services in the several amounts set forth hereinafter in this paragraph 7, to negotiate and execute agreements or arrangements (if and only if any such agreement or arrangement confers the right on the parties thereto and Air Cargo, Inc. to cancel the agreement or arrangement on not more than sixty days' notice), and to renew, modify, cancel, or terminate in accordance with the terms hereof, any existing arrangement, by or between any of the parties hereto and any other party or parties engaged in performing under contract pick-up and delivery or other services with respect to the handling of air freight, air cargo, or air express (including without limitation, the Air Express Agreement between the respective parties and the Railway Express Agency, Inc.), provided, however, that

limited ACI to performing the functions of providing cartage and terminal services directly or by contract—functions which clearly do not include promoting a new corporation, owning stock in it, or sitting on its Board of Directors. Furthermore, there is no merit to defendants' argument that the airlines have "ratified" the agreement and thereby have become parties to it. Under the law of agency ratification can only occur when the principal, having

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insofar as the foregoing delegates authority to cancel or terminate any existing arrangements which have heretofore been filed with and approved by the Civil Aeronautics Board, the exercise thereof shall be subject to either (a) approval of the cancellation or termination of such an existing arrangement by the Civil Aeronautics Board or (b) the approval of this agreement by the Civil Aeronautics Board. It is agreed and understood in this connection that it is the purpose and intent of this agreement that Air Cargo Inc. should have responsibility for:

(a) Determining the date upon which each party hereto shall combine and operate as a single air cargo service its air express and airfreight services (which date shall be the same for all parties hereto), and shall make available to all shippers of air cargo, on an optional basis, such special services as may be practicable to meet shippers' requirements; and each of the parties will, on and after such date, take such action as may be appropriate to effect such objective;

(b) Providing, directly or by contract, pick-up and delivery services at all points within the continental United States served by any party hereto, and tripper services between such points and the airports through which they are served;

(c) Providing, directly or by contract, terminal facilities and services incidental to the proper handling of air freight and air cargo at all such points; and

(d) Providing, directly or by contract, clerical, accounting, and other services which may be desired by the parties hereto in the interest of promoting maximum efficiency, eliminating unnecessary duplication of expense, and coordination of their respective air freight and air cargo services with one another and with those rendered by other common carriers of property.

knowledge of the material facts involved in a transaction, evidences an intention to ratify it. See Restatement of Agency 2d ¶¶ 91, 93-100. Here there is no evidence in the record that the airlines knew the material facts involved in the formation of Ryd-Air or that they communicated a desire to ratify its formation. Though, through their dealings with ACI, they dealt with Ryd-Air from 1970 forward, their dealings with ACI are insufficient as a matter of law to constitute a ratification of the creation by ACI and Ryder System of Ryd-Air or of the contract executed by ACI with Ryd-Air.

In view of our finding that the Ryd-Air agreement cannot be immunized by the Board because it is not signed by "air carriers," we find that there is no need to examine independently the cartage contract between Ryd-Air and ACI. As interdependent parts of an inclusive plan, it is clear that the fate of the plan rested on the fate of the Ryd-Air agreement. Accordingly, the district judge was correct in refusing to grant appellants' motion for a stay so as to permit presentation of the issues here to the CAB.

Even if we were to find that the Board could immunize the agreements under its Section 412 authority, we would still conclude, on the basis of *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) *and Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2 Cir. 1968), *cert. denied*, 393 U.S. 846 (1968), that the doctrine of primary jurisdiction is inapplicable. Under these authorities a district court is not required to defer to the Board except in those cases where the activities complained of are "lawful" or "arguably lawful" under the Federal Aviation Act of 1958. Also, when the only relief a plaintiff seeks in the district court is an award of damages the district court need not defer to the Board

irrespective of whether the activities are continuing activities or completed activities.[5] See *Carnation Co.* v. *Pacific Westbound Conference, supra; Allied Air Freight, Inc.* v. *Pan American World Airways, Inc., supra at* 448.

The agreement forming Ryd-Air has not been submitted to the Board and has not been explicitly approved by it. Although the claim is made in defendants' brief that the Ryd-Air agreement is "arguably lawful," the question of whether the agreement is "arguably lawful" is for the court to decide. To do so, the court must interpret, at least in the first instance, the order of 1947, to determine whether there is a factual basis to support the claim. Surely this is a task within the court's competence. See *CAB* v. *Modern Air Transport, Inc.*, 179 F.2d 622, 625 (2 Cir. 1950); *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 349 F.2d 1007 (1 Cir. 1965); *cert. denied*, 382 U.S. 984 (1966). *Compare Pan American World Airways* v. *United States*, 371 U.S. 296 (1963). As we interpret the CAB order, it cannot possibly have comprehended the formation of Ryd-Air or approved its creation years after the issuance of the order. The carefully phrased "it having been represented"

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[5] Although both *Carnation* and *Allied* dealt with activities which had been discontinued, the clear implication of the opinions is that the court has jurisdiction if the activities are unlawful under the regulatory statute and the relief sought is an award of damages. The rationale is that an award of damages could not interfere with a later agency decision prospectively to approve the continuance of the challenged activity, whereas injunctive relief could cause a conflict between the agency and the court. Thus, the Court in *Carnation* laid down the broad principle that courts are only precluded "from awarding damages when the defendants' conduct is arguably lawful . . . ." 383 U.S. at 222. No distinction is drawn between continuing conduct and past conduct. Likewise, in *Allied*, we noted that a damage award could not interfere with cease and desist power or with immunization power inasmuch as the damage award would not have "prospective applicability." 393 F.2d at 448.

paragraph[6] as well as the "future development" clause[7] clearly evidence the Board's intention that the future activities of ACI were to be limited under the Order to those explicitly set out in the 1947 agreement. Manifestly, there is nothing in the agreement authorizing the promotion by ACI of a new company, the ownership of a stock interest in it, or the holding of seats by ACI nominees on a new corporation's Board of Directors. Defendant ACI suggests that since it can lawfully provide such services directly certainly it can provide such services by contracting with an affiliate in which it has a 20% stock interest. This misses the point. Although defendant has the authority to provide services directly it does not have the authority to provide such services indirectly through an ownership interest in a joint venture which it has not been authorized to promote or to participate in. The Board's 1947 approval of ACI merely authorizes its establishment and approves its then-contemplated activities which flow therefrom. *Trans World Airlines, Inc.* v.

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[6] This paragraph reads as follows:

> . . . It having been represented to the Board that Air Cargo, Inc. will not have responsibility for nor control over, the rates, charges, rules, regulations, or practices applicable to air transportation; that it will not issue or sign any shipping contract or document except in the name of and as agent for a member air carrier party to the agreement; that it will not assume any responsibility to the consignor or consignee of any property transported by air; and it will not hold itself out to the public to perform any service or accept any responsibility except as agent for a member air carrier party to the agreement; . . . .

[7] This clause reads as follows:

> The Board further finding that the future development of Air Cargo, Inc. is uncertain and that its activities may require future reconsideration of the approval granted herein . . . .

Hughes, 332 F.2d 602 (2 Cir 1964): see Federal Aviation Act 414, 49 U.S.C. §1384.

Inasmuch as the two agreements have not been immunized and are not "arguably lawful" we agree with the district court that it should exercise its jurisdiction over this antitrust action.

Finally, we see no need to direct the district court to stay, in its discretion, the proceedings in court pending administrative action by the CAB. The issues are not technical in nature, and there is no need to seek uniformity. *Compare Trans World Airlines, Inc.* v. *Hughes, supra, with Pan American World Airways, Inc.* v. *United States, supra.* Furthermore, the CAB cannot award damages, the only relief which the plaintiffs request. *Apgar Travel Agency* v. *International Air Trans. Association*, 107 F.Supp. 706, 711 (SDNY 1952); *Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F.Supp. 199, 211 (D.N.J. 1952). Whenever possible courts avoid duplicated or drawn-out proceedings. The efficient administration of justice demands it. See *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc., supra* at 445; *Japan Line, Ltd.* v. *Sabre Shipping Corporation*, 407 F.2d 173 (2 Cir.), *cert. denied*, 395 U.S. 922 (1969).

Affirmed.

Appendix A

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of November, one thousand nine hundred and seventy-two

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

72-1500

BREEN AIR FREIGHT, LTD. and MERCURY AIR FREIGHT, INC.,
Plaintiffs-Appellees,

—v.—

AIR CARGO, INC., RYDER SYSTEM, INC., RYD-AIR INC., AIR CANADA, AIRLIFT INTERNATIONAL INC., *et al.*,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Appendix A

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of December, one thousand nine hundred and seventy-two

72-1500

BREEN AIR FREIGHT, LTD. and MERCURY AIR FREIGHT, INC.,

Plaintiffs-Appellees,

—v.—

AIR CARGO, INC., RYDER SYSTEM, INC., RYD-AIR INC., AIR CANADA, AIRLIFT INTERNATIONAL INC., *et al.*,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Appendix A

Opinion of Irving Ben Cooper, *D. J.*

(Dated December 6, 1971)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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Ryder System, Inc., and Ryd-Air, Inc.

Appendix A

Motion for a stay denied.

The complaint alleges: Plaintiffs Breen Air Freight, Ltd. and Mercury Air Freight, Ltd. are corporations which at all relevant times were engaged in the business of pick-up and delivery of air freight in the Metropolitan area of the City of New York. Complaint, ¶¶32, 33.

Defendant Air Cargo, Inc. was first established in 1941 by Agreement among seventeen (17) certified air carriers and is wholly-owned by certified air carriers. The activities of Air Cargo, Inc. include: perform certain ground terminal operations in connection with the transportation of air freight such as ground transportation incidental to air-line hauls; facilitate joint interline movement of air freight over the lines of its member air carriers; make arrangements for joint interline agreements and services with other carriers for over-the-road hauls in connection with transportation of property by surface carriers and aircraft; make provisions for air freight terminals. ¶¶34, 35.

Defendant Ryder System, Inc. operates, *inter alia*, a fleet of vehicles which transport ground freight. ¶38. Ryd-Air, Inc. is a corporation wholly owned by Air Cargo, Inc. and Ryder System, Inc., ¶40; was formed pursuant to an agreement between Air Cargo, Inc. and Ryder System, Inc. on or about June, 1970, ¶41; and services by ground transportation domestic air freight handled by the member airlines of Air Cargo, Inc. in the Metropolitan area of the City of New York and other places, ¶42. In 1970, Air Cargo, Inc. terminated its employment with plaintiffs and employed defendant Ryd-Air, Inc. instead.

On several theories, plaintiffs claim this conduct constitutes a violation of the anti-trust laws (claims 1-3) and breaches of contract (claims 4-5).

Appendix A

Defendant airlines and Air Cargo, Inc. contend that their conduct is insulated from the operation of the anti-trust laws and that judicial proceedings should be stayed on the ground that primary jurisdiction is vested in the Civil Aeronautics Board (C.A.B.).

There is no primary C.A.B. jurisdiction or conferring of anti-trust immunity over this action. The criteria of need for uniformity, special knowledge, expertise or specific congressional delegation to the administrative agency of the subject of the dispute are not applicable here and the agency action does not insulate defendants.

Initial C.A.B. approval merely supports the establishment of Air Cargo, Inc. and not all the consequences which flow from it. *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602 (2d Cir. 1964); 9 C.A.B. 468 (1948); See Federal Aviation Act §414, 49 U.S.C. §1384. While an express finding of immunity from the anti-trust laws may not be necessary to confer immunity, the record does not support blanket approval or continued surveillance of the activities of Air Cargo, Inc. itself acting on its own—to be distinguished from broader, over-all scrutiny of such conceded areas of traditional C.A.B. expertise as tariffs. The representations made to the C.A.B. were the basis of its approval; the activities of Ryd-Air as a subsidiary of Air Cargo, Inc. are a deviation therefrom; to permit the new activities to be insulated would achieve indirectly what could not be done directly. Springer affidavit, April 14, 1971, pp. 10-11 and Ex. 2 (C.A.B. Order E-1086); Brodsky affidavit, July 8, 1971, p. 3 and Ex. 3, ¶5.

The policies which supported initial establishment of Air Cargo, Inc.—economics and efficiency—do not extend to confer categorical immunity over the incidental activities here. Specifically, there is no showing that the

activities alleged are "necessary" to comply with the C.A.B. order. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968).

The activities at issue are not "arguably lawful" under the Federal Aviation Act. No party to the Ryd-Air agreement is an "air carrier" under Section 412 (a) of the Act, 49 U.S.C. §1382(a); the agreement has not been submitted to the C.A.B.; without C.A.B. approval actions pursuant to an agreement are not immune from the anti-trust laws. *Allied Air Freight, supra*, at 448. Unlike *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1931) and *Far East Conference* v. *United States*, 342 U.S. 570 (1951) plaintiff does not seek an injunction but only treble damages which the Board does not have the power to give. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222 (1966).

The issue is not the interpretation of an unapproved agreement or whether the order itself is reasonable but whether the order has been violated. The courts are competent to make such an interpretation. *C.A.B.* v. *Modern Air Transport, Inc.* 179 F.2d 622 (2d Cir. 1950); *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 349 F. 2d 1007 (1st Cir. 1965), *cert. denied*, 382 U.S. 984 (1966); *Compare Pan American World Airways* v. *United States*, 371 U.S. 296 (1963).

So ORDERED:

New York, N.Y.
December 6, 1971

.....

United States District Judge

Appendix A

Memorandum by Cooper, *D. J.* on Reargument

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IRVING BEN COOPER, D. J.

While the motion to re-argue is granted, upon reconsideration we adhere to our original decision. The motion for certification of an interlocutory appeal is granted. 28 U.S.C. §1292(b).

No party to the *ACI-Ryder* agreement (not submitted to the C.A.B.) is an "air carrier" under Section 412(a) of the Act, 49 U.S.C. §1328(a). Accordingly, the conduct under the ACI-Ryder agreement cannot be immunized and "arguably lawful" under Section 412 itself and therefore the fact that the agreement has not terminated does not control. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441, 446 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968); See *Trans World Airlines* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964). The record does not contain factual allegations to support either the position that Air Cargo, Inc. acted as agent for the airlines in the ACI-Ryder agreement or to create the necessity of a hearing on this issue. Additionally, such entry does not accord with C.A.B. order E-1086 which states that ACI shall "not issue or sign any shipping contract except in the name of *and* as agent for a member air carrier party to the agreement" (emphasis added).

As this and our prior order involve a "controlling" question of law as to which there is a substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of the litigation, we certify an interlocutory appeal.

Settle order on notice.

New York, N.Y.
February 16, 1972

/s/ Irving Ben Cooper
United States District Judge

Appendix A

Order on Reargument and Granting Certification of an Interlocutory Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This Court having considered the motion by the air carrier defendants and defendant Air Cargo, Inc. for reargument of their motion for a stay or, in the alternative, for an amendment of the Court's decision and order of December 6, 1971, by including therein a certification pursuant to 28 U.S.C. §1292(b), and the Court having granted said motion to reargue and upon reconsideration having adhered to the decision and order of December 6, 1971, and having granted the motion for certification of an interlocutory appeal,

IT IS ORDERED that the motion to reargue is granted and the Court adheres to its original decision and order of December 6, 1971; and

IT IS FURTHER ORDERED that the motion for amendment of said decision and order of December 6, 1971 to include therein a certification of an interlocutory appeal pursuant to 28 U.S.C. §1292(b) is granted and said decision and order is hereby amended to include the following statement:

> This order, and the Court's subsequent memorandum of law as to which there is a substantial ground for of February 16, 1972 involve a "controlling" question difference of opinion and an immediate appeal there-

from may materially advance the ultimate termination of the litigation. We therefore certify an interlocutory appeal.

/s/ IRVING BEN COOPER
United States District Judge

Dated: New York, N.Y.
March 10, 1972

APPENDIX B

Constitutional Provisions, Statutes and Regulations Involved

United States Constitution:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Aviation Act of 1958:

§ 408. [*72 Stat. 767, as amended by 74 Stat. 901, 83 Stat. 103, 49 U.S.C. 1378*] (a) It shall be unlawful unless approved by order of the Board as provided in this section—

> (1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
>
> (2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person

engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided*, That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

§ 412. Pooling and other agreements; filing, approval by Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum,

of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. (72 Stat. 770, 49 U.S.C. § 1382)

Appendix B

§ 414. Legal restraints

Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. (72 Stat. 770, 49 U.S.C. § 1384)

Other Statute:

28. U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

• • • •

Civil Aeronautics Board Economic Regulations:

§ 289.3. Types of agreements which need not be filed.

(a) *Ground services and facilities.* Agreements between certificated route air carriers, or between any such air carrier(s) and any foreign air carrier(s), for the furnishing of ground facilities, ground equipment, ground service, or building or ground space: *Provided,* That the fees or charges therefor are known or antici-

pated not to exceed $50,000 during any twelve-month period: *And, provided further,* That in case the aggregate annual charge under an agreement believed to fall within this exemption at the time of execution thereof exceeds the dollar limitation in any twelve-month period, the carrier shall (1) report promptly the total amount paid, and (2) file the agreement with the Board under section 412(a) of the Act upon request by the Director of the Board's Bureau of Economic Regulation.

(b) *Free or reduced-rate transportation.* Agreements between certificated route air carriers, or between supplemental air carriers, or between certificated route carriers and supplemental carriers, or between any such air carriers and foreign air carriers for the issuance or interchange of free or reduced-rate transportation: *Provided,* That such agreements do not provide for the issuance or interchange of passes for free or reduced-rate transportation other than as described in documents filed pursuant to § 223.6 of Part 223 of this supcharter.

(c) *Pick-up and delivery.* Agreements between certificated route air carriers or indirect air carriers on the one hand and surface motor carriers on the other hand for pick-up and delivery of property: *Provided,* that all of the points named in the agreement and the rates and charges to the public for such service are set forth in tariffs filed by the air carriers with the Board pursuant to Part 221 of this subchapter. (27 F.R. 1067)

Appendix B

§ 289.4. Effect of exemption.

The exemption granted by this part shall not be deemed to constitute an "order made under sections 408, 409, and 412" within the meaning of section 414 of the Act. (27 F.R. 1068)

APPENDIX C

AGREEMENT

Among Certain Air Carriers Relating To Air Cargo Services

Whereas, the parties are air carriers authorized by certificates of public convenience and necessity issued pursuant to the Civil Aeronautics Act of 1938 as amended, to engage directly in the transportation of property between various points in the United States; and

Whereas, the parties desire further to coordinate their respective services in the continental United States with respect to the transportation of property, both with one another and with those rendered by other common carriers, so as to provide a complete and integrated system for the transportation of property by air to and from all points in the United States; and

Whereas, in order to promote maximum efficiency and to eliminate unnecessary duplication of expense, the parties desire to employ Air Cargo, Inc. to perform, on their behalf and in their names or as principal, certain services and to provide certain facilities required in connection with the handling of air cargo; and

Whereas, the authorized shares of stock of Air Cargo, Inc. are 1,000 shares, each of no par value, of which 544 shares are outstanding; and

Whereas, the stockholders of Air Cargo, Inc. and the shares of stock respectively held by them are as follows:

Appendix C

Stockholder	*Shares Held*
All American Aviation, Inc.	4
American Airlines, Inc.	100
Braniff Airways, Inc.	22
Chicago and Southern Air Lines, Inc.	10
Colonial Airlines, Inc.	4
Continental Air Lines, Inc.	6
Delta Air Lines, Inc.	12
Eastern Air Lines, Inc.	100
Inland Air Lines, Inc.	6
Mid-Continent Airlines, Inc.	8
National Airlines, Inc.	6
Northeast Airlines, Inc.	4
Northwest Airlines, Inc.	24
Pennsylvania-Central Airlines Corporation	26
Transcontinental & Western Air, Inc.	100
United Air Lines, Inc.	100
Western Air Lines, Inc.	12
Total	544

Now, Therefore, for and in consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree as follows:

• • •

Appendix C

7. Each of the parties hereby confers upon Air Cargo, Inc. full power and authority, on its behalf, subject only to a limitation upon payment that may be due for services in the several amounts set forth hereinafter in this paragraph 7, to negotiate and execute agreements or arrangements (if and only if any such agreement or arrangement confers the right on the parties thereto and Air Cargo, Inc. to cancel the agreement or arrangement on not more than sixty days' notice), and to renew, modify, cancel, or terminate in accordance with the terms hereof, any existing arrangement, by or between any of the parties hereto and any other party or parties engaged in performing under contract pick-up and delivery or other services with respect to the handling of air freight, air cargo, or air express (including without limitation, the Air Express Agreement between the respective parties and the Railway Express Agency, Inc.), provided, however, that insofar as the foregoing delegates authority to cancel or terminate any existing arrangements which have heretofore been filed with and approved by the Civil Aeronautics Board, the exercise thereof shall be subject to either (a) approval of the cancellation or termination of such an existing arrangement by the Civil Aeronautics Board, or (b) the approval of this agreement by the Civil Aeronautics Board. *It is agreed and understood in this connection that it is the purpose and intent of this agreement that Air Cargo, Inc. should have responsibility for:*

* * *

(b) Providing, directly or by contract, pick-up and delivery services at all points within the continental United States served by any party hereto, and tripper services between such points and the airports through which they are served;

Appendix C

(c) Providing, directly or by contract, terminal facilities and services incidental to the proper handling of air freight and air cargo at all such points; and

(d) Providing, directly or by contract, clerical, accounting, and other services which may be desired by the parties hereto in the interest of promoting maximum efficiency, eliminating unnecessary duplication of expense, and coordination of their respective air freight and air cargo services with one another and with those rendered by other common carriers of property.

• • •

Appendix C

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 31st day of December, 1947

Agreement C.A.B. No. 1041

In the Matter of an Agreement filed pursuant to section 412(a) of the Act between

ALL AMERICAN AVIATION, INC.

and

SIXTEEN OTHER AIR CARRIERS

relating to the establishment of Air Cargo, Inc.

ORDER APPROVING AGREEMENT

There having been filed with the Board pursuant to section 412(a) of the Act and Part 251 of the Economic Regulations, an agreement between All American Aviation, Inc. and sixteen other carriers, providing for the establishment of Air Cargo, Inc., evidenced by Agreement C.A.B. No. 1041;

The Board finding that the agreement provides that member air carriers of Air Cargo, Inc. agree to utilize that corporation in the performance of certain ground terminal

operations in connection with the transportation of air cargo such as ground transportation incidental to airline hauls; the facilitation of joint interline movement of air cargo over the lines of member air carriers; the arrangement for joint interline agreements and services with other common carriers for over-the-road hauls in connection with transportation of property by surface carriers and aircraft; the provision of cargo terminals; and the performance of other services and provision of other facilities incidental to these enumerated matters; and to act as agent for the member air carriers in certain other related matters; and

It having been represented to the Board that Air Cargo, Inc. will not have responsibility for nor control over, the rates, charges, rules, regulations, or practices applicable to air transportation; that it will not issue or sign any shipping contract or document except in the name of and as agent for a member air carrier party to the agreement; that it will not assume any responsibility to the consignor or consignee of any property transported by air; and it will not hold itself out to the public to perform any service or accept any responsibility except as agent for a member air carrier party to the agreement; and

The Board not finding that the agreement will be adverse to the public interest or in violation of the Act if approved upon the basis of the representations and findings set forth above and subject to the following conditions:

(1) That Air Cargo, Inc. and its member air carriers supply to the Board copies of such agreements and documents and submit such information in relation to the activities of Air Cargo, Inc as may be prescribed or requested by the Economic Bureau of the Board.

(2) That any holder of a certificate of public convenience and necessity issued by the Board authorizing

transportation of property by aircraft be authorized to participate in Air Cargo, Inc. as a matter of right;

The Board further finding that the future development of Air Cargo, Inc. is uncertain and that its activities may require future reconsideration of the approval granted herein; and

The Board further finding that approval of the agreement does not constitute a determination of the reasonableness, for any purpose under the Civil Aeronautics Act, of payments by member air carriers to or on account of Air Cargo, Inc.; and

There having been filed with the Board a petition in this proceeding by the Brotherhood of Railway Clerks requesting the Board to impose certain conditions in its order of approval for the protection of member air carrier employees affected as a result of the operations of Air Cargo, Inc. or in the alternative that the matter be assigned for hearing; and

The Board further finding that the said petition does not set forth sufficient grounds to warrant the relief requested therein; and that approval of the agreement shall be reconsidered in the event that at any time a showing is made that the interests of air carrier employees at a particular airport or place have been, or are about to be, substantially adversely affected on account of the extension to said airport or place of the terminal operations by Air Cargo, Inc.

IT IS ORDERED THAT:

1. Agreement C.A.B. No. 1041 be and it hereby is approved subject to the conditions set forth above.

Appendix C

2. The said petition of the Brotherhood of Railway Clerks, filed in this proceeding on August 22, 1947, be and it hereby is denied without prejudice.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

(SEAL)